

ID: CCA-491513-09

Number: **200941014**

Release Date: 10/9/2009

Office:

UILC: 6511.00-00, 6511.03-00

From:

Sent: Thu 4/9/2009 3:13 PM

To:

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Subject: Period of Limitations and 5 year Carryback Loss

You asked whether a credit or refund is barred by the period of limitations in the following fact pattern. The taxpayer timely filed Form 1040 reflecting a net operating loss for the year ended . On the same date, the taxpayer filed a Form 1045 for the year ended to carryback the loss to under the new 5-year carryback rules. The last payment on the tax year was made on .

The general rule for limitations on credits or refunds consists of two parts: 1) the time period within which the claim must be filed; and 2) the limitations on the amount of the credit or refund. These limitations are provided section 6511(a) and (b). A taxpayer must first meet the requirements in Section 6511(a), which provides the time period within which the claim must be filed, i.e. within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later, or if no claim is filed, within 2 years from the time the tax was paid. If a taxpayer has filed the claim within the time period in 6511(a), then the limitations on the amount provided in section 6511(b) must be considered. The limits on the amount depend on whether or not a claim was filed, and if so, whether the claim was filed within the 3-year period. Section 6511(c) and (d) provide special rules (exceptions) for the application of the limitation periods in section 6511(a) and (b).

Your case is controlled by the special rules in section 6511(d) because it involves a net operating loss carryback. Section 6511(d)(2)(A) provides a special period of limitation for net operating loss or capital loss carrybacks, which replaces “part one” of the general rule above. Section 6511(d)(2)(A) provides that if a claim for credit or refund relates to an overpayment attributable to a net operating loss carryback or a capital loss carryback, in lieu of the 3-year period of limitation prescribed in subsection (a), the period shall be that period which ends 3 years after the time prescribed by law for filing the return (including extensions) for the taxable year of the net operating loss or net capital loss which results in such carryback, or the period prescribed in subsection (c) in respect of such taxable year, whichever expires later. The special rule for net operating loss carrybacks does not contain the “or 2 years from the time the tax was paid” language that is in the general rule in 6511(a). Thus, a claim for credit or refund related to a loss carryback is timely if it is filed within 3 years from due date of the loss year. In the case of a claim for carryback of a net operating loss, there is no requirement that the claim for refund must be filed within 2 years from the time the tax was paid.

With respect to “part two” of the rules for limitations on credits or refund, the flush language of section 6511(d)(2)(A) provides that “in the case of such a claim, the amount of the credit or refund may exceed the portion of the tax paid within the period provided in subsection (b)(2) or (c), whichever is applicable, to the extent of the amount of the overpayment attributable to such carryback.” The amount of the credit or refund of a net operating loss (up to the amount of the overpayment attributable to the carryback) is not limited by the provisions in the section 6511(b) or (c). Thus, a taxpayer can receive a credit or refund for up to the amount of the overpayment attributable to the carryback.

As a result, in the case of a net operating loss arising on a Form 1040 for the year ended _____, a claim for credit or refund based on the carryback of that loss must be filed prior to _____ (assuming that the taxpayer has not secured an extension). In the case of a net operating loss or capital loss carryback, there is no requirement that the claim must be filed within 2 years from the date the tax was paid. Further, the taxpayer will be entitled to a credit or refund up to the amount of the carryback loss (assuming sufficient taxable income to offset the loss and that all other requirements for the carryback are met).

Thus, we believe that the in the above fact pattern, the taxpayer's refund resulting from the net operating loss carryback from _____ to _____ is not barred by the period of limitations of section 6511(a) or (b). We do not opine on whether the taxpayer meets any of the other requirements for the 5-year carryback of a net operating loss.

Please call if you have any questions.